IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ASTRO A. MILLER, Appellant.	No. 37615-6-II UNPUBLISHED OPINION

Bridgewater, J. — Astro A. Miller appeals his conviction for threatening to bomb or injure property as prohibited in RCW 9.61.160. We hold that the trial court erred in failing to instruct the jury that it must determine that a violation of RCW 9.61.160 required a "true threat," and that such error in this case was not harmless beyond a reasonable doubt. We reverse and remand for a

new trial.

Facts

From 12:22 am until 12:30 am on the morning of February 9, 2008, Astro Miller repeatedly called 911, using two pay phones at the Aberdeen bus mall. At 12:22 am, he made the following statement to the 911 operator: "In three seconds the 'f*****' bus station is going to blow up." Ex. 2 at 1 (capitalization altered). The operator continued to receive hang-up calls from the two pay phones at the same location at the bus mall. Five minutes after his first call, Miller again spoke to the 911 operator saying: "Send them out because Im [sic] gonna 'f****' blow this up right now." Ex. 2 at 1 (capitalization altered).. The operator described the caller's voice as "gravelly," noting that it sounded like the caller had been drinking. Ex. 2 at 1 (capitalization altered). The operator contacted Aberdeen Police Sergeant Ross Lampky and reported that the call was sufficient for a false reporting charge.

Sergeant Lampky responded to the call and walked from the Aberdeen Police Department to the nearby bus mall in less than two minutes. Sergeant Lampky stood in an alley and observed a tall man, Miller, repeatedly dialing a short phone number on both pay phones and then hanging up the receivers. When he approached Miller from behind, Sergeant Lampky observed him dial 911. Sergeant Lampky asked Miler if he had any explosives, and Miller responded, "That's for me to know." RP (Apr. 8, 2008) at 41. The officer noticed that Miller smelled strongly of alcohol. It was cold and raining hard, and Miller wore an old army jacket over many layers of clothing. After arresting and searching him, Sergeant Lampky asked Miller if he had made the call just to get a place to stay.

The State charged Miller with threats to bomb or injure property. At his jury trial, the court defined the charge as follows: "A person commits the crime of threatening to bomb or injure property when he threatens to bomb or otherwise injure any place of public assembly, or any government property, or any other building or structure, or a common carrier." Suppl. CP at 18 (instruction 4). The "to convict" instruction stated in relevant part that to convict Miller as charged the State had to prove the follow elements beyond a reasonable doubt: "(1) That on or about February 9, 2008, Mr. Astro Miller, threatened to bomb or otherwise injure a place of any public assembly, any governmental property, or any other building, common carrier, or structure; and (2) That the act occurred in the State of Washington." Suppl. CP at 18 (instruction 5). None of the court's instructions mentioned the phrase "true threat."

The jury convicted Miller as charged. The court sentenced Miller to a standard range sentence of one year plus seven days. Miller timely appealed.

Discussion

Miller contends that the trial court's instructions relieved the State of its burden to prove a true threat and reversal is warranted. We agree.

We must first determine, however, if Miller waived his right to appeal the alleged instructional error by failing to object at trial. A party is required to object to an erroneous instruction in order to afford the trial court the opportunity to correct the error. CrR 6.15(c); *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). Failing to object to an instruction may bar review. *Scott*, 110 Wn.2d at 686. But a party may raise a manifest error of constitutional magnitude for the first time on appeal. RAP 2.5(a)(3). An instruction that omits an

element of a crime charged thus relieving the State of its burden of proof is such a constitutional error. *Scott*, 110 Wn.2d at 688 n. 5.

Here, relying on *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006), Miller argues that the trial court's instructions failed to inform the jury that the State had to prove that the threat was a serious one based on an objective standard, and thus, the instructions as given relieved the State of its burden to prove a judicially added required element of the crime with which he was charged. Because Miller alleges that the instructional error relieved the State of its burden of proof, his alleged error may be raised for the first time on appeal.

As to Miller's substantive argument, RCW 9.61.160 provides that it is unlawful for any person to threaten to bomb or otherwise injure any building, structure, or any place used for human occupancy, or to communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated o repeated. *See* RCW 9.61.160(1). The statute also provides that it is not a defense that the threatened bombing or injury was a hoax. *See* RCW 9.61.160(2).

Furthermore, as our Supreme Court decided in *Johnston*, 156 Wn.2d at 364, the threat must be a "true threat," and the jury must be so instructed. The *Johnston* court explained that a true threat is a serious threat, not one said in jest, idle talk, or political argument; that whether a true threat has been made is determined under an objective standard that focuses on the speaker; and the court defined that objective standard as a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted

as a serious expression of an intention to inflict bodily harm upon or to take the life of another individual. *Johnston*, 156 Wn.2d at 360-61.

The State concedes that the jury should have been instructed to consider whether or not Miller's threat was a "true threat." Br. of Resp't at 1.[1] The State contends, however, that the omission was harmless error and urges us to find that there was not a reasonable probability that the lack of a true threat instruction affected the verdict. But under the facts of this case we cannot so hold.

We may find constitutional error harmless only if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000) (citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986)). An instructional error is presumed to have been prejudicial unless it affirmatively appears that it was harmless. *Lorang*, 140 Wn.2d at 32. A harmless error is an error that is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party

[1] Despite the concession, the State cites to *State v. Tellez*, 141 Wn. App. 479, 170 P.3d 75 (2007). There, the defendant argued, based on *Johnston*, that "true threat" is an essential element that must be proven to the jury in any case involving a statute criminalizing the use of threatening language, and thus the term must appear in the information and the to convict instruction. Division One rejected this contention, and upheld the defendant's conviction for telephone harassment because the trial court in fact gave an instruction defining true threat. The *Tellez* court held that so long as the trial court defines a true threat for the jury, the defendant's First Amendment rights will be protected. *Tellez*, 141 Wn. App. at 484. Here, no such instruction was given and *Tellez* does not require a different result.

assigning it, and in no way affected the outcome of the case. *Lorang*, 140 Wn.2d at 32.

We are bound by the requirement of *Johnston* that "the jury must be instructed that a conviction under RCW 9.61.160 requires a true threat and must be instructed on the meaning of a true threat." *Johnston*, 156 Wn.2d at 366. Here, the deputy prosecutor specifically argued to the jury, based on the language of the instructions given, that Miller's intent was irrelevant. She told the jury:

> The instructions are clear what the elements of this crime are. They've been given to you by the judge. Those are what you must follow. Nowhere in the instructions will you find the word "intended" to do harm, that he had explosives on his person. These are not elements that are required, these are not things the State must prove, and the lack of those items do not excuse the behavior that was proven here. We're talking about whether or not there was a threat made to bomb or injure property. We're not talking about what Mr. Miller's intent was or was not, about whether or not he had the means to follow through on what he said he was going to do. That is a red herring. The instructions tell you what you must find in order to return a verdict of guilty. . . . If he made the threat, he is guilty.

RP (Apr. 8, 2008) at 61-62.

As noted, Miller's first call to the 911 operator said that the bus mall would blow up in three seconds, then he repeatedly kept calling back from the same bank of phones and hanging up for several minutes. Later, he again spoke to the 911 operator, telling her to send the police out because he was going to blow up the bus mall "right now," but then continued to repeatedly call back and hang up. Ex. 2 at 1 (capitalization altered). The 911 operator observed that the caller sounded like he had been drinking. While a reasonable jury, if properly instructed, could determine that this conduct was indeed an objectively serious threat, it could also reasonably determine that the conduct was merely annoying. Moreover, the jury was instructed, and told by the prosecutor in closing argument, that they could convict Miller based merely on the fact that he

made a threat (i.e., that he spoke the words of a threat). The *Johnston* court reversed because the jury as instructed "could *infer* . . . that it could convict merely on the basis that [the defendant] said the words." *Johnston*, 156 Wn.2d at 365 (emphasis added). The same is true here. In light of the instructions and the State's closing argument, we cannot hold that the omission of a "true threat" instruction was harmless beyond a reasonable doubt. Applying *Johnston*, we reverse Miller's conviction and remand for a new trial.[2]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Van Deren, C.J.

Penoyar, J.

[2] *Cf. State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004) (because of the First Amendment implications, a conviction for felony harassment based upon a threat to kill requires that the State satisfy both the First Amendment demands-by proving a true threat was made-and the statute, by proving all the statutory elements of the crime; where the State has failed to show a true threat, the conviction must be reversed).